E&O Overview for Minnesota Insurance Agents

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Who am I?

Who am I?

Aaron Simon is a litigation attorney with the law firm of Brownson & Linnihan, PLLP in Minneapolis, Minnesota. He is admitted to practice law in Minnesota and Wisconsin. A focus of Mr. Simon's practice is defending insurance agents and agencies and handling insurance coverage cases in state and federal courts.

In addition, Mr. Simon is a member of the Minnesota State Bar Association, the Hennepin County Bar Association, the Wisconsin State Bar Association, the Minnesota Defense Lawyers Association, the Defense Research Institute, the Minnesota Defense Lawyers Association, and the Professional Liability Defense Federation. Mr. Simon is also a committee chair of the North Central Chapter of the Professional Liability Underwriting Society.

To learn more about Aaron, go to http://www.brownsonlinnihan.com/bio/aaron-m-simon/.

Outline ⟶

1. → Review Standard of Care/Duty of Insurance Agents in Minnesota.

2. → Trends in Insurance Litigation.

3. → Review specific case studies from prior lawsuits.

4. → Suggestions/Advice.

1. Review Standard of Care

Source: McInnes, Kerr, Vanduzer, Managing The Law: The Legal Aspects of Doing Business, 4th ed., Pearson, 2014

Standard of Care

Was the Defendant careful enough?

What would a <u>reasonable person</u> do in similar circumstances?

Takes precautions against **foreseeable risks**, but not every conceivable danger.

Considers **likelihood of harm** and **potential severity of harm.**

Adopts **affordable precautions**.

Takes risks for greater **social utility**; e.g. saving a life

Less care is required in emergencies. **Sudden peril doctrine** allows mistakes in difficult circumstances

Who is the REASONABLE PERSON??

It is not the Defendant. It does not matter that the Defendant did their best. Objective test, not subjective.

W.C.W. Chau

1

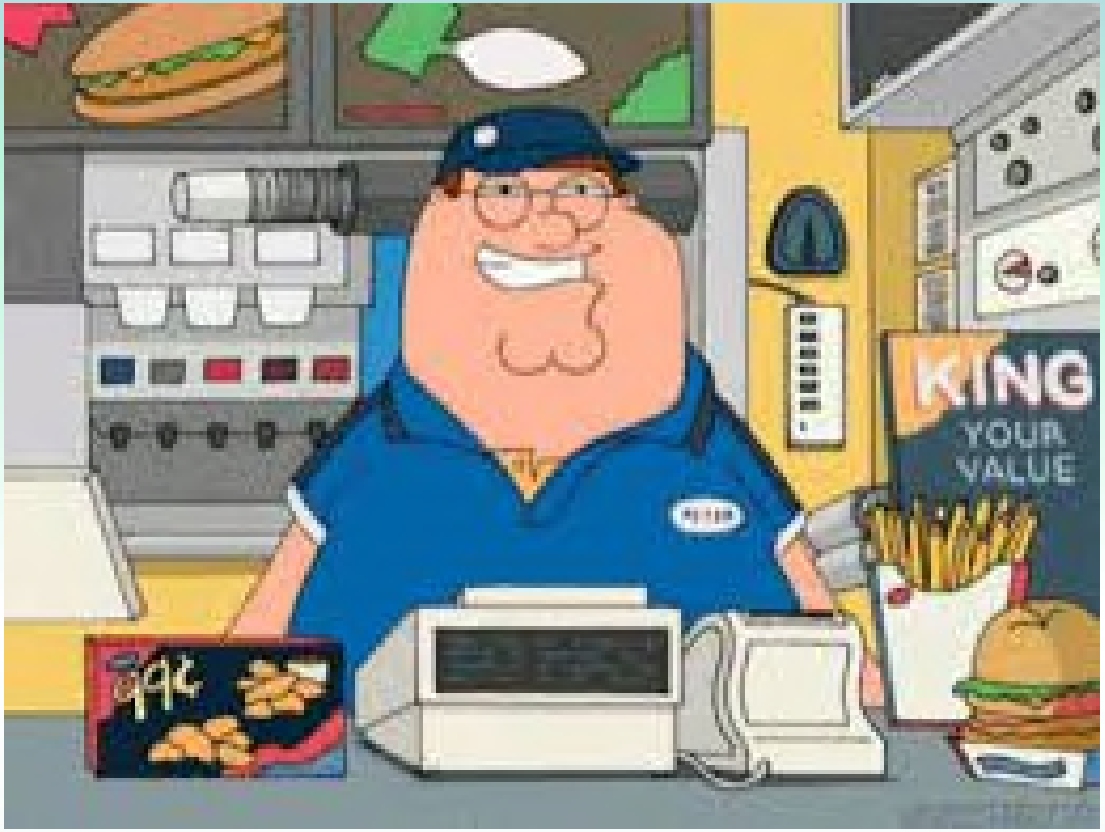
Normal Standard of Care or Duty Insurance Agents - Minnesota

"An insurance agent's duty is ordinarily limited to that of an agency relationship, to act in good faith and to follow instructions."

Gabrielson v. Warnemunde, 443 N.W.2d 540, 543 (Minn.1989)

ORDER TAKER STANDARD

Normal Standard of Care or Duty Insurance Agents - Minnesota

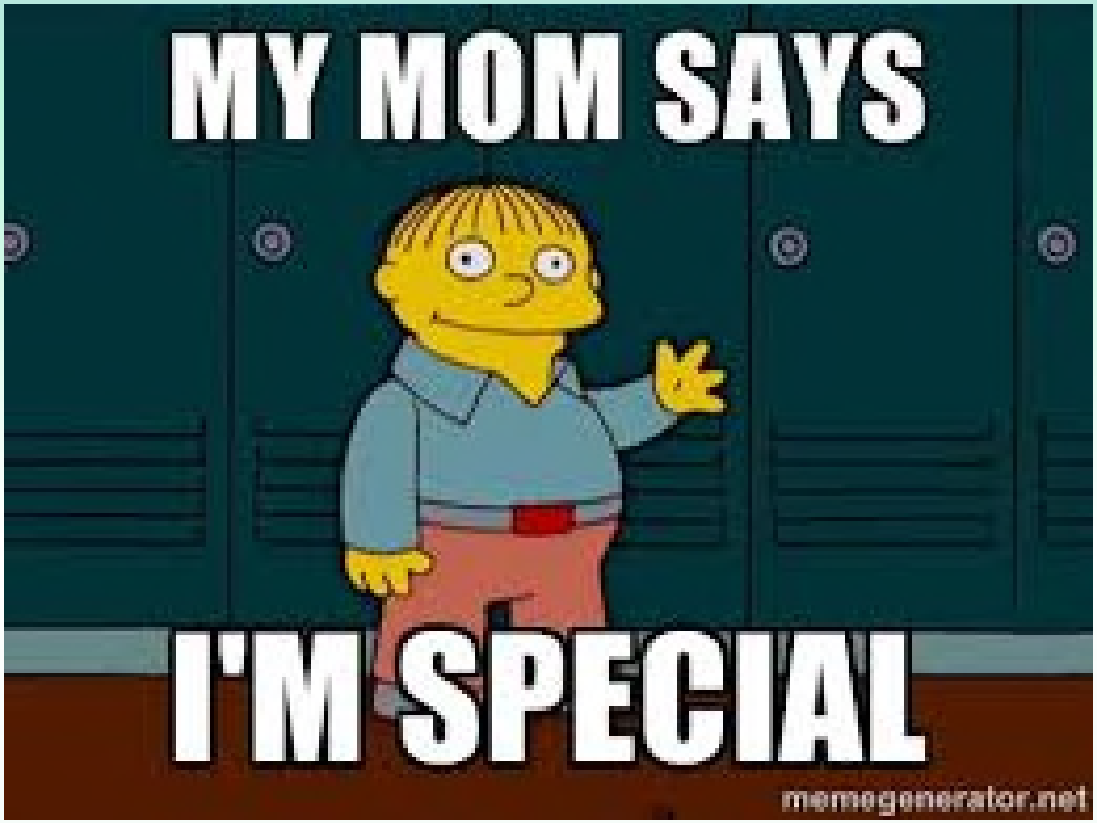


ORDER TAKER STANDARD

Special Relationship
Heightened Standard of Care

An insurance customer can demonstrate a special relationship by showing that there exists something more than the standard agent-customer relationship. This depends upon the particular relationship between the agent and the customer and is determined on a case by case basis.

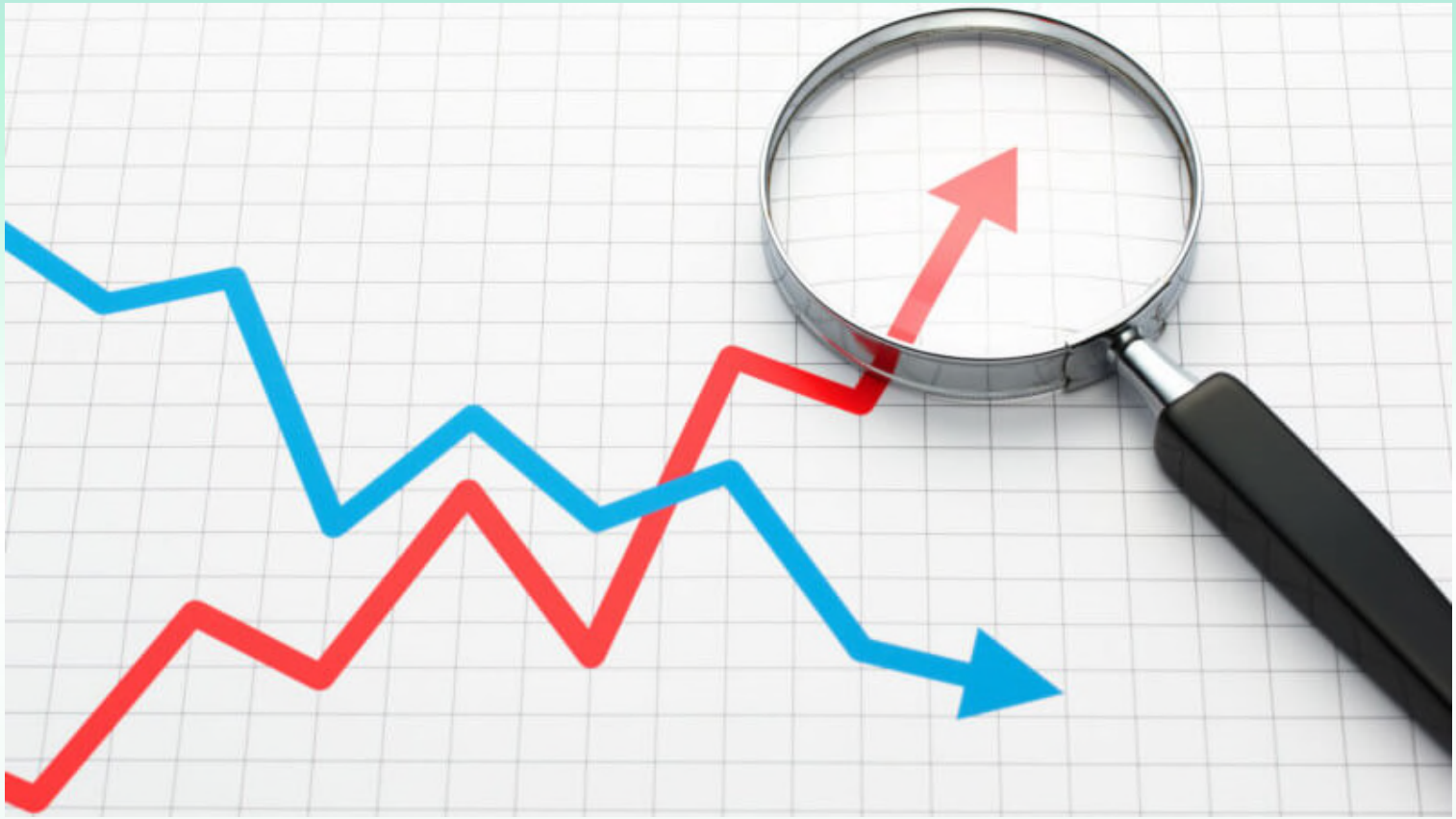
Special Relationship
Heightened Standard of Care



Special Relationship
Heightened Standard of Care

To show a special relationship exists between an insurance agent and an insured is a high burden and the courts have frequently been wary to find the existence of a special relationship in prior cases.

2. Trends in Insurance Litigation



Trends in Insurance/Insurance Agent Litigation

1. Continued increase in litigation costs and litigation complexity.
2. Continued automatic inclusion of agents in coverage case regardless of supporting facts.
3. Increase in insurance companies taking hard/strict positions on coverage and denying or limiting claims.
4. More insurance products being developed – potential for much more claims. E.g. – cyber liability coverage, drone coverage.

3. Case Studies

Specific Case Examples
Case 1 - Crop Insurance case.

Specific Case Examples
Case 1 - Crop Insurance case.

1. “sales closing date” had already passed.
2. Agent contact underwriter.
3. Underwriter at Company says do it this way.
4. Agent follows underwriters advice.
5. Crop Loss
6. Company denies claim.

Specific Case Examples
Case 1 - Crop Insurance case.

After the denial of the claim by the crop insurance company the agent calculated the crop loss amount to be approximately $2,000. The agent on his own (without contacting his professional liability carrier) decided to pay the insurance customer this amount (approximately $2,000).

Specific Case Examples
Case 1 - Crop Insurance case.

The insurance customer disputed the amount of the crop loss. The insurance customer calculated the crop loss to be approximately $65,000.

Specific Case Examples
Case 1 - Crop Insurance case.

The insurance customer brought suit against the crop insurance company and the agent.

The agent tendered the defense of the case to the crop insurance company.

The crop insurance company denied the tender of the defense and refused to defend the agent.

Protracted litigation ensued, including multiple motions before the court and five depositions.

Specific Case Examples
Case 1 - Crop Insurance case.

On the eve of trial the case settled. The crop insurer paid $40,000 to the insurance customer and $500 in costs to the agent's professional liability carrier.

The agent and the agent's carrier paid nothing besides the $2000 the agent offered to the insurance customer right after the denial of the claim and the forgiveness of approximately $3000 owed to the agent by insurance customer for unpaid premiums fronted by the agent.

Specific Case Examples
Case 1 - Crop Insurance case.

However, over $60,000 was spent in attorneys' fees and costs defending the agency.

The agency had a $7,500 deductible that applied to settlement amounts or judgment amounts only (as opposed to a cost of defense deductible).

Specific Case Examples
Case 1 - Crop Insurance case.

Lessons learned from case:

1) Sometimes no matter what you do as an agent you might be sued. Make sure you are prepared for this possibility (funds for deductible – good documentation of your files).

2) You and your insurance customer might not agree on the amount or type of loss.

Specific Case Examples
Case 1 - Crop Insurance case.

Lessons learned from case:

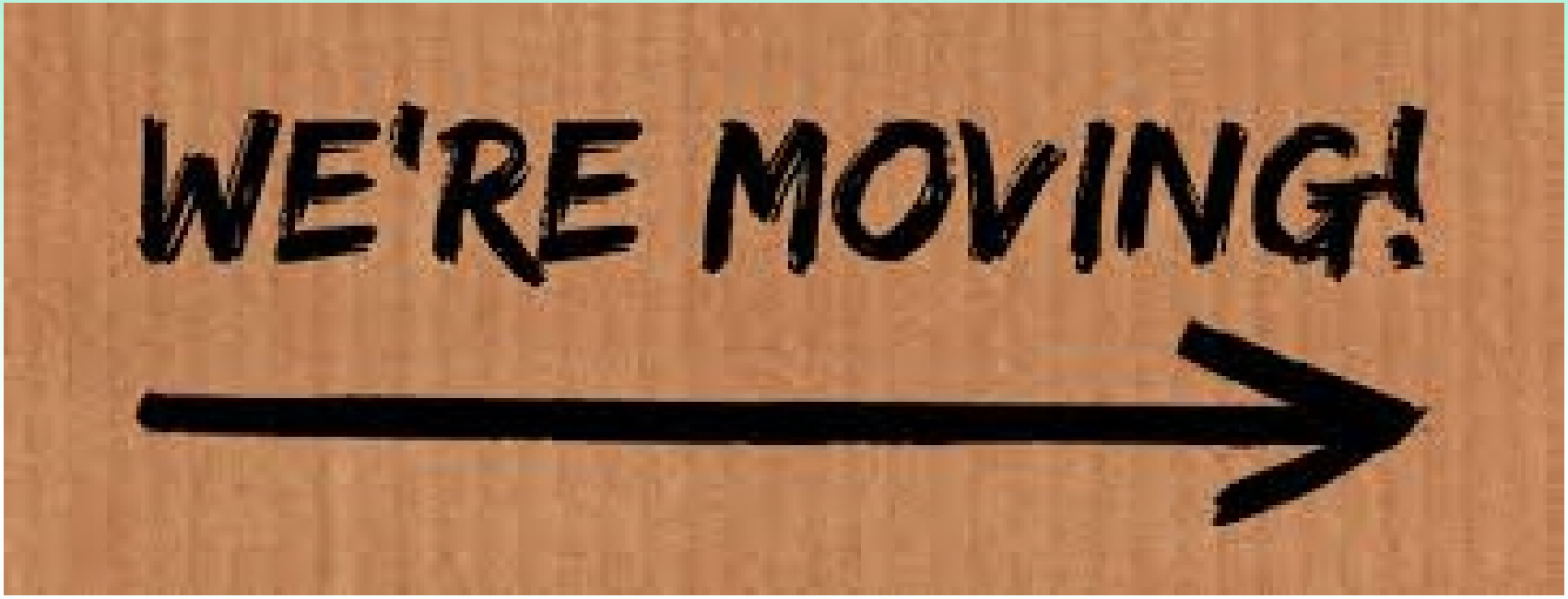
3) Even in cases where both the agent and the agent's professional liability insurer pay nothing (or very little) to resolve the case there are still significant defense costs and significant time lost by the agent in almost every case.

Specific Case Examples
Case 1 - Crop Insurance case.

Lessons learned from case:

4) The agent should not make an offer to settle. In addition the agent should make no commitment one way or the other in regards to liability. The agent should not make statements about E&O insurance or the like. The agent must assume that whatever the agent says can and will be used against the agent in a subsequent lawsuit.

Specific Case Examples
Case 2 – Premises Change Request.



Specific Case Examples
Case 2 – Premises Change Request.

In June of 2007 the insurance customer made a request to change the insurance customer's mailing address and premises location. The agent told the customer that this would be taken care of.

The agent forwarded this request to the agent's CSR to handle. The agent's CSR sent a request for a change of mailing address and change of premises to the insurer.

Specific Case Examples
Case 2 – Premises Change Request.

After the request for a change of mailing address and change of premises was sent to the insurer, the insurer changed the mailing address but sent out a letter to the agent requesting additional information about the new building in order to process the premises change request.

The agent never saw the letter requesting additional information about the new premises.

No such letter was found in the agent's file.

Specific Case Examples
Case 2 – Premises Change Request.

The insurance customer's file at the agency showed that the request for a change of premises was forwarded to the insurer in the form of a policy memo from the agency.

The insurer's underwriting file shows that this policy memo was received by the insurer.

A short while later the insurer sent back a new declarations page to the agent and the insurance customer noting the change to the mailing address on the front page but not making any change to the premises on the second page.

Specific Case Examples
Case 2 – Premises Change Request.

In September of 2007 the insurance customer claimed an employee theft loss of its inventory.

This was close to the end of the first policy period.

The alleged theft loss arose out of a dispute amongst the owners of the insurance customer's business.

One of the owners took the inventory of business without the consent of the other owner.

Specific Case Examples
Case 2 – Premises Change Request.

The other owner sued the owner that took the inventory. This other owner also submitted an insurance claim to the insurer for the alleged theft loss.

The insurer denied coverage for the theft loss based in part on the fact that it did not occur at scheduled premises.

The alleged theft loss occurred at the new location and the insurer claimed that there had not been an effective change of premises to the new location.

Specific Case Examples
Case 2 – Premises Change Request.

The insurer had additional and better support for its denial of coverage. Mainly the insurer's denial of coverage was supported by the fact that the individual that "stole" from insurance customer business was an owner of insurance customer business and thus there would be no coverage for the alleged employee theft under the insurance customer's business policy.

Specific Case Examples
Case 2 – Premises Change Request.

The insurance customer sued the insurer.

The insurance customer did not sue the agent.

The agent's file was subpoenaed in this litigation. In addition, the agent and the agent's CSR were subpoenaed to testify at a deposition in this litigation.

The agent's insurer paid for an attorney to represent the agent in responding to the subpoenas. This is part of the coverage provided in many professional liability policies.

Specific Case Examples
Case 2 – Premises Change Request.

In the litigation between the insurance customer and the insurer there was a settlement mediation.

A few days before the settlement mediation the insurer's attorney "invited" the agent (and the agent's professional liability insurance carrier) to participate at the mediation.

Specific Case Examples
Case 2 – Premises Change Request.

The insurer's attorney argued that the agent was at fault for not following up on the premises change request and therefore the agent had potential exposure in the case.

The agent (and its professional liability insurance) disagreed and declined to participate in the mediation.

The mediation was unsuccessful.

Specific Case Examples
Case 2 – Premises Change Request.

After the mediation there was a Court ordered mandatory settlement conference with the Magistrate Judge assigned to the case.

Again the insurer “invited” the agent (and the agent’s professional liability insurance carrier) to voluntarily participate in the settlement conference.

Again, the agent (and its professional liability insurance carrier) declined to participate in the settlement conference.

Specific Case Examples
Case 2 – Premises Change Request.

Shortly before the Court Ordered Settlement Conference the insurer instituted a third-party action against the agent; or in other words:

THE INSURER SUED THE AGENT!!!

This forced the agent (and the agent's professional liability insurance carrier) to participate in the settlement conference, because the agent was now a party to the litigation. The case settled at the Court ordered settlement conference with the Magistrate Judge for a confidential amount.

Specific Case Examples
Case 2 – Premises Change Request.

Lessons learned from case:

1) Whenever possible follow up and confirm requests for changes to policies. This is particularly so when multiple requests for changes are made at the same time. Make sure each individual request for a change is made. If there are any discrepancies contact the insurer to resolve. Perhaps get your insurance customers to sign off in writing on complex or multiple changes.

Specific Case Examples
Case 2 – Premises Change Request.

Lessons learned from case:

2) It can be surprising to find out how an insurer treats you as an agent in the litigation or claim context even if there has been a significant positive prior relationship between the you and the insurer.

Specific Case Examples
Case 2 – Premises Change Request.

Lessons learned from case:

3) Simply because an agent is not sued initially, an agent may be brought into the case at a later time. If subpoenaed let your professional liability carrier know, particularly because of the subpoena coverage in many professional liability policies.

4) Also, even if you are just contacted by an attorney representing an insurance company or an insurance customer, contact your professional liability carrier and get their input and advice.

Specific Case Examples
Case 2 – Premises Change Request.

Lessons learned from case:

5) In general it is recommended that you not voluntarily turn over any information, files or documents without first contacting your professional liability carrier or an attorney. Exception is if one of your customers requests a copy of their file or something from their file.

RED FLAG – However, if your customer calls you up after a loss and asks you for a complete copy of their file this could signal the customer is contemplating a claim against you.

Specific Case Examples
Case 3 – Conversion Exclusion.

Specific Case Examples
Case 3 – Conversion Exclusion.

Theft coverage was in place in the insurance customer's policy with his previous agent and remained in place when the insurance customer transferred his policy to the new agent.

However in both of the insurance customer's previous policies and the policies purchased through the new agent there was an exclusion for conversion.

The insurance customer's property insurance was always insured under an Actual Cash Value basis as opposed to a Replacement Cost Value basis.

Specific Case Examples
Case 3 – Conversion Exclusion.

The insurance customer never communicated that he wanted coverage for conversion or coverage in the situation of if a customer failed to return a rented item.

Specific Case Examples
Case 3 – Conversion Exclusion.

In this case an individual rented a large wood chipper from the insurance customer's rental business but then failed to return it to the insurance customer's rental business. The individual that rented the wood chipper gave the insurance customer a fake name and used an invalid credit card.

Specific Case Examples
Case 3 – Conversion Exclusion.

At the request of the insurance customer a claim was submitted to the insurance customer's insurance carrier for the unreturned wood chipper.

The insurance carrier denied coverage for this claim under the conversion exclusion in the policy.

Specific Case Examples
Case 3 – Conversion Exclusion.

At first the agent thought the wood chipper was covered under the insurer's policy and the insurance company wrongfully denied coverage.

The agent did not fully appreciate the difference between conversion and theft and did not necessarily have all the facts from the insurance customer to properly make this determination.

Specific Case Examples
Case 3 – Conversion Exclusion.

After the conversion loss the agent sent correspondence to the broker involved in the sale of the policy and the insurer and questioned the denial of coverage in this regard.

Eventually the agent realized that conversion is different from theft and that the conversion exclusion applied and the denial of coverage while unfortunate was appropriate.

Specific Case Examples
Case 3 – Conversion Exclusion.

The damages in the case were limited to the actual cash value of the wood chipper at the time of loss (minus any additional insurance premium that would have been required in order to obtain special insurance for conversion).

The insurance customer sought $11,970.

This is what it cost the insurance customer to buy a new wood chipper.

Specific Case Examples
Case 3 – Conversion Exclusion.

However, the wood chipper was insured on an Actual Cash Value basis as opposed to a Replacement Cost Value basis.

The converted wood chipper was purchased for $6,750 a few years prior.

Thus, the converted wood chipper would likely have an actual cash value of $6,750 or less at the time of the loss. The property policy also had a $500 deductible.

Specific Case Examples
Case 3 – Conversion Exclusion.

It should also be noted that optional coverage for conversion is expensive.

Very few insurers in Minnesota will provide this type of insurance to rental companies.

The insurance customer received a quote for the conversion coverage after the loss and declined to purchase the additional coverage.

Specific Case Examples
Case 3 – Conversion Exclusion.

The insurance customer sued the insurance carrier for wrongful denial of coverage and the agent for failing to sell the insurance customer conversion coverage.

Both the insurance carrier and the agent were able to get out of the case on separate motions for summary judgment.

Specific Case Examples
Case 3 – Conversion Exclusion.

Lessons learned from case:

1) Even cases with small damage values can be a nuisance. The total claimed by the insurance customer in this case was only $11,970. Nevertheless, two depositions were taken and a motion was made before the Court. There was more spent defending the case then the actual amount of damages being sought by the insurance customer.

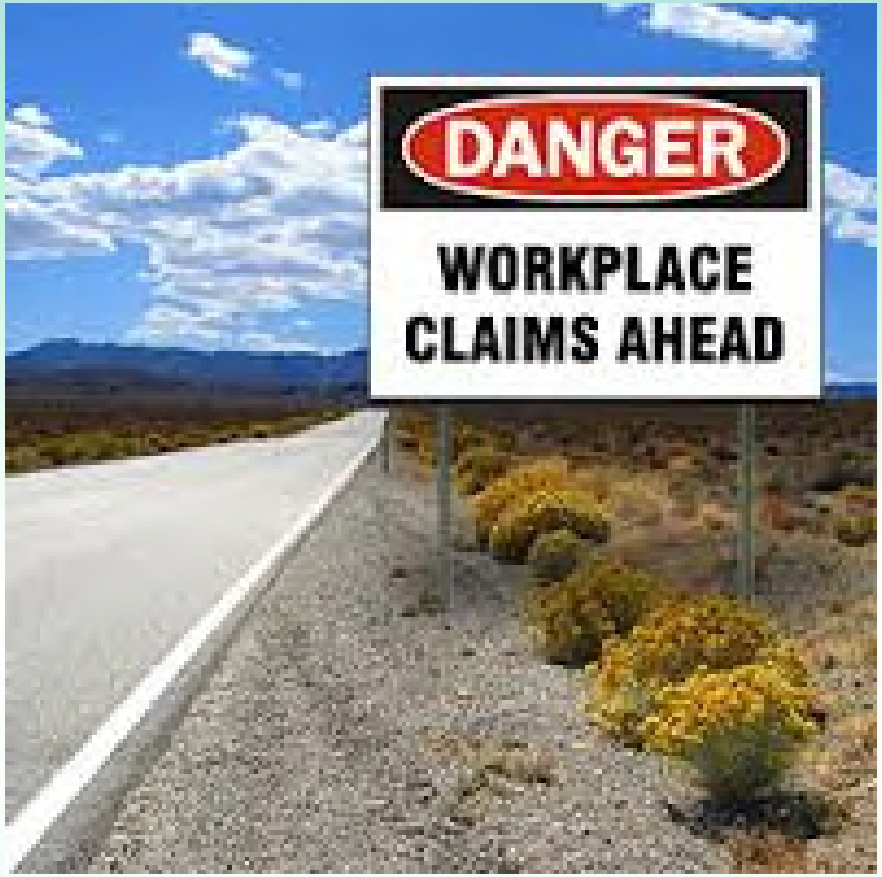
Specific Case Examples
Case 3 – Conversion Exclusion.

Lessons learned from case:

2) The one problem area in this case was the agent's representations as to coverage after the loss. If you choose to make representations as to coverage after a loss (which is highly discouraged) it is suggested that extra care is made under these circumstances (or in the alternative simply do not make any representations of coverage after a loss).

Generally, it is a best practice to leave coverage decisions up to the insurance carrier and stay out of this portion of the claims process.

Specific Case Examples
Case 4 – Sexual Harassment Case.



Specific Case Examples
Case 4 – Sexual Harassment Case.

This case involves the lack of insurance coverage for an underlying sexual harassment lawsuit against the insurance customer.

The agent in this case started selling some personal automobile insurance to the insurance customer in the late 70s or early 80s. The insurance customer was involved in several businesses mostly focused around cattle sales and farming. The agent started selling a farm package policy to the insurance customer in or around 1987 to cover the insurance customer's various businesses.

Specific Case Examples
Case 4 – Sexual Harassment Case.

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Specific Case Examples
Case 4 – Sexual Harassment Case.

The agent did not sell insurance for all of the insurance customer's businesses. Specifically, the agent did not sell insurance for a gas station and convenience store owned in part by the insurance customer.

Main business cattle rancher. The insurance customer started his cattle sales business in approximately 1970. Operated this business for approximately 17 years before ever buying business insurance or the farm package insurance from the agent in this case.

Specific Case Examples
Case 4 – Sexual Harassment Case.

This son owned a majority of the gas station and convenience store; the insurance customer and his wife own 2%.

Over the years the insurance customer himself had little to no interaction with the agent. The insurance customer delegated this responsibility to his wife and his other son.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The insurance customer had experienced prior claims and litigation. It was because of those experiences that that the insurance customer and his son decided to add themselves personally onto the insurance customer's business insurance.

The insurance customer left it up to his son to communicate this request to the agent. The insurance customer had no knowledge of what his son communicated to the agent in regards to this request.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The insurance customer never looked at the insurance policies sold to his businesses by the insurance agent.

The insurance customer wanted to be added to the farm package policy for “Personal Injury Liability” coverage.

Prior to the underlying lawsuit, the insurance customer had never been sued for sexual harassment, assault and battery, reprisal, or slander.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The insurance customer's son that dealt with the agent had nothing to do with the gas station business and had nothing to do with the underlying sexual harassment lawsuit.

Specific Case Examples
Case 4 – Sexual Harassment Case.

Around 2006, the insurance customer's son took over the insurance for the cattle sales business from his mom. Around this same time the insurance customer's son recalls calling the agent and asking him over the phone to add coverage for the insurance customer (his father) on the business insurance.

This phone conversation lasted less than a minute. Besides the one phone call with the agent, the son does not recall any other discussions with the agent about the "Personal Injury Liability" coverage.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The son did not specifically ask the agent to sell insurance coverage for sexual harassment, reprisal, assault and battery, or slander. The son also did not ask for any employment related practices insurance.

After this single brief phone conversation, the agent wrote up an insurance proposal indicating that he would request that the farm package insurer add "Personal Injury Liability" coverage for the insurance customer and his son to the farm package policy.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The son discussed this insurance proposal made by the agent with his friend, another insurance agent. The other agent told the insurance customer's son that the "Personal Injury Liability" coverage that was contained in the proposal was the insurance the customer needed.

Even though the agent requested "Personal Injury Liability" coverage from the farm package insurer, the insurer declined to offer "Personal Injury Liability" coverage to the insurance customer.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The insurance customer was specifically notified by the insurer that it was not adding the “Personal Injury Liability” coverage for the insurance customer. The insurance customer did nothing after the receipt of this letter to obtain further or additional liability coverage.

After the letter the insurance customer (as well as his son) did not ask the agent to follow up on this issue or attempt to obtain any personal liability coverage from any other insurance company.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The agent was never asked to sell the insurance customer insurance to cover sexual harassment, assault and battery, reprisal, or slander. The agent never sold insurance to the insurance customer in regards to the gas station.

In the fall of 2009 a former employee of the gas station brought claims against the insurance customer alleging assault and battery, slander, sexual harassment, and reprisal.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The claims brought in this lawsuit were made against the insurance customer personally and the gas station. The claims bought against the insurance customer in this lawsuit were for assault and battery and intentional slander.

The claims for assault and battery arose out of two trips to Florida where the insurance customer was involved in car racing. The former employee claimed the insurance customer intentionally sexually assaulted her on these trips to Florida.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The claims for intentional slander arose out of alleged intentional negative false statements made by the insurance customer regarding the former employee after the Florida trips. The claims brought against the gas station were for sexual harassment and reprisal.

The former employee worked at the gas station but none of the insurance customer's other's businesses.

The former employee is the sister of a woman who used to be married to another son of the insurance customer (this is the son that owns the gas station).

Specific Case Examples
Case 4 – Sexual Harassment Case.

The insurance customer claimed the trips to Florida to race cars were a business expense of the cattle sales business. The agent was never informed about the trips to Florida to race cars or that the insurance customer was claiming these trips as a business expense of the cattle sales business. The agent was never asked to sell insurance in regards to these trips or for any type of car racing activities. In fact, the agent had no idea that the insurance customer was racing cars in Florida and that an employee of the gas station was going on these trips.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The insurance customer tendered the lawsuit to his insurers under two different policies.

His insurers denied a defense and denied indemnity for the lawsuit.

The insurance customer then defended the lawsuit himself, hiring his own attorney, and eventually settled the case with the former employee.

Specific Case Examples
Case 4 – Sexual Harassment Case.

In the litigation against the insurance customer it was defense counsel's position (supported by testimony from representatives of the insurer and an expert opinion) that even if the insurer would have issued "Personal Injury Liability" coverage for the insurance customer personally under the policy, the policy would not have covered the claims alleged against the insurance customer in the underlying sexual harassment lawsuit.

This is because: 1) the definition of "occurrence" in the policy and, 2) various exclusions in the policy.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The insurance customer also tendered the underlying sexual harassment lawsuit to the gas station's insurance carrier. This policy was not sold by the insurance agent in this case. This insurer also denied coverage for the underlying sexual harassment lawsuit for similar reasons cited insurance customer's other insurers.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The farm package insurer does not sell an insurance product that would have covered the claims alleged against the insurance customer in the underlying sexual harassment lawsuit.

Also, it would have been very difficult if not impossible for the insurance customer to obtain insurance from any insurance company that would have covered the claims asserted against the insurance customer in the underlying sexual harassment lawsuit.

Specific Case Examples
Case 4 – Sexual Harassment Case.

The insurance customer brought a lawsuit against the insurance agent for failing to obtain the “Personal Injury Liability” coverage and other related claims.

After taking depositions and exchanging numerous documents, I made a motion for summary judgment to be dismissed from the case. The arguments in favor of dismissal of the agent were as follows.

Specific Case Examples
Case 4 – Sexual Harassment Case.

First, the agent reasonably followed the instructions of his insurance customer and acted in good faith, and thus the agent was entitled to summary judgment.

Second, the specific insurance that the insurance customer requested the agent to sell him ("Personal Injury Liability" coverage) would not have provided coverage to the insurance customer for the claims in the underlying lawsuit.

Specific Case Examples
Case 4 – Sexual Harassment Case.

Third, the insurance customer failed to produce any evidence that any insurance company would have sold insurance to the insurance customer that would have covered the claims brought against him in the underlying sexual harassment lawsuit.

The Court agreed with me and granted the motion for summary judgment and dismissed the case.

Specific Case Examples
Case 4 – Sexual Harassment Case.

Lessons learned from case:

1) Even in situations where it appears there is clearly no coverage, and there is no reason that there should be any coverage, an agent can still be sued by his insurance customer.

Specific Case Examples
Case 4 – Sexual Harassment Case.

Lessons learned from case:

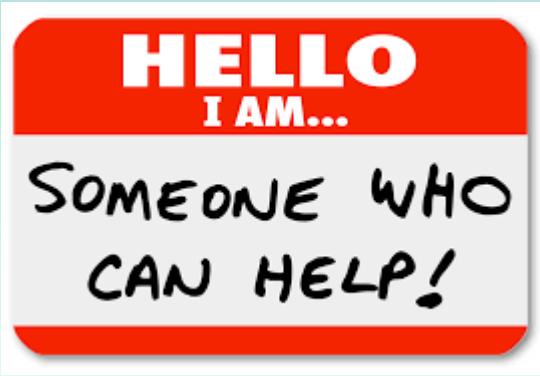
2) The insurance customer had little direct contact with the agent in this case. While this was not overly problematic in this case it should raise red flags. This is particularly the case when an insurance customer has multiple and different types of business. Contact should be made with the specific insurance customer or documentation from the insurance customer should be obtained directing the insurance agent to work with an intermediary.

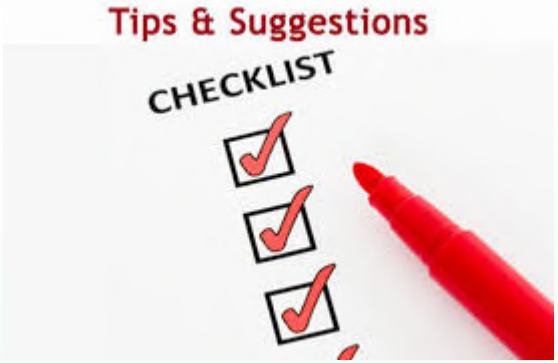
Specific Case Examples
Case 4 – Sexual Harassment Case.

Lessons learned from case:

3) The agent in this case had an initial strong desire to appease his insurance customer and thought he was negligent. The agent initially wanted the professional liability carrier and me to settle the case. It took a little time for me to convince the agent that he was not negligent and that he did not do anything wrong from a legal standpoint.
4) Therefore do not necessarily assume as an agent you are negligent or that you made a mistake. Speak with your professional liability carrier or defense counsel first.

4. Suggestions / Advice





Suggestions / Advice

1) Documentation! Documentation! Documentation!

2) Put in place a good electronic Agency Management System and use it regularly and consistently.

3) Use follow-up and confirming emails with your insurance customer whenever possible.

Suggestions / Advice

4) Calendar important dates in an outlook (or other similar electronic or online calendar program). Renewals, expirations, etc…

5) Avoid getting involved in the claims process and in particular claims determinations after a loss.

Suggestions / Advice

6) Be particularly careful around unique or unusual business circumstances and situations.

7) If you have a potential E&O issue contact your professional liability carrier and/or defense counsel (me) directly.

Suggestions / Advice

8) It should be customary practice to offer the next level of insurance (generally in the form of a proposal with a quote or estimated quote for the next level of insurance).

9) Do not make assumptions about what your customers want or need; ask them.

Suggestions / Advice

10) Do not think that you will never be sued or that a claim will never be made against your agency.

Conclusion/Questions

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